United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

301

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

No. 71-1090

v.

Cr. No. 2025-69

WHITT AUSTIN,

Appellant.

Appeal from the United States District Court
of the District of Columbia

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223-4580

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ISSUES PRESENTED FOR REVIEW

I. In a rape case, is the corpus delecti sufficiently corroborated when the victim makes a prompt report of the offense and is emotionally distraught at that time, but where there is no evidence of sexual injury or of semen?

2. May one be found guilty of kidnapping where the victim is walked a short distance into an alley and then down the street to an automobile, is detained inside it while police cars circle in vain, is raped and then is driven to a gas station and to a restaurant at her own suggestion, although she is warned by her assailant not to "make him mad" or "try anything"?

3. May the prosecution, over objection, elicit from the complainant in a rape case testimony that she identified a photograph of the defendant in the Sex Squad of Police Headquarters? When the above testimony is added to testimony that appellant was visited at St. Elizabeths Hospital, is a fair trial possible?

4. Where the defense is misidentification, may the defense subpoena all police photographs of subjects who bear a close resemblance to the defendant?

5. Where the prosecution acknowledged at the conclusion of the defense that it would have been helpful to the defense to have had the arrest photograph of defendant, was the Government obliged to tell defense counsel of the existence of this photograph?

This case has not been before this Court under this or any other name.

References to Rulings - None

STATEMENT OF THE CASE

Appellant Whitt Austin appeals from convictions for kidnapping, rape while armed, robbery and two assaults with a dangerous weapon. He is serving concurrent prison sentences of six to 18 years and three to 10 years. Trial was by jury before Judge June L. Green of the United States District Court for the District of Columbia.

Case For The Prosecution

In the early hours of September 25, 1969, Mrs. Queen V. Harrison and one Ben Pettiford, Jr., having been to a party, were driven to 15th and East Capital Streets where they left the car to catch a bus. (Tr. 33, 34) A man identified in court as the appellant came up to them with his hands in his pockets. (Tr. 34, 35) He had on a long black overcoat and a hat. (Tr. 35) After a brief discussion with him, Mrs. Harrison and Pettiford crossed the street twice, the stranger following. (Tr. 36) He told them they had gone far enough and led them into an alley. (Tr. 36) near Seventeenth Street, S. W. (Tr. 37) Mrs. Harrison asked if the man wanted her money and he replied he did want the money and her too. (Tr. 36)

Pettiford tried to grab the man and was knocked to the pavement and struck across the mouth with a gun. (Tr. 36) The assailant told Mrs. Harrison to have Pettiford leave and after being told to do so, Pettiford ran from the alley and called police. (Tr. 36, 103) Mrs. Harrison gave her assailant eight dollars in cash. (Tr. 38) At gunpoint, he walked Mrs. Harrison further back into the alley and began to have relations with her or assault her when a dog barked. (Tr. 39) The assailant walked Mrs. Harrison to several parked cars nearby to see whether they were locked. (Tr. 39) Unable to get into any car, he led Mrs. Harrison down the alley to a car that he said was his friend's. (Tr. 41) The two got on the back of the car where the assailant threatened Mrs. Harrison with a knife. (Tr. 42) The car was parked near Seventeenth and East Capitol Streets. (Tr. 83)

He directed Mrs. Harrison to remove her undergarments, and he had intercourse with her. (Tr. 42, 87) Mrs. Harrison saw a police car, its red light flashing, passing by, while she was in the back seat. (Tr. 43) As the police cars passed, the rapist ducked down and had Mrs. Harrison lie down. (Tr. 43)

Police drove with Pettiford around the block a few times and then left, returning later. He found no-one. (Tr. 104, 105)

Mrs. Harrison complained of being cold, and her assailant offered to get her liquor. (Tr. 44) Mrs. Harrison asked for coffee or something to eat. (Tr. 44) The victim asked her assailant to get her home in time to feed her children. He cautioned her repeatedly not to get him "mad" and not to yell or "try something". (Tr. 44-46) The assailant drove Mrs. Harrison, at her suggestion, to a gasoline station at an undisclosed location and bought a dollar's worth of gas. (Tr. 46) Also at her suggestion, he drove to the Hickory Hut, a restaurant, (Tr 46) located at 1655 Benning Road, N. E. (Tr. 108)

The car in which Mrs. Harrison was taken was an old dark car with a loud muffler and it gave off a lot of smoke. (Tr. 46) The assailant left the keys in the car with his victim, walked into the restaurant and out of it and urinated at the side of the building. (Tr. 47-48) He then walked Mrs. Harrison into the restaurant holding something hard against her back. (Tr. 48) He had parked the car in the way of another car. When he left

to move his car, (Tr. 48) Mrs. Harrison told a waitress that she had been raped and that she wanted police. (Tr. 49)

The assailant returned to the restaurant and stood behind Mrs. Harrison. A teenager told Mrs. Harrison that police were in the corner of the restaurant. (Tr. 50) Mrs. Harrison denied needing the police. As two officers approached, Mrs. Harrison ran to them and screamed that she had been raped. (Tr. 1300 The time was 5 A.M. (Tr. 126)

The assailant ran from the restaurant and was seen backing up in his car by one of the officers who tried to write down the license plate number. (Tr. 143) However, he was unable to trace the car, evidently having recorded a wrong number. (Tr. 134)

Mrs. Harrison was hysterical and fainted. (Tr. 50) She was revived and taken to the 9th Precinct Stationhouse where statements were taken. (Tr. 53) Mrs. Harrison was then taken to D. C. General Hospital for an examination, which was delayed. Before the examination, she washed herself out because she felt dirty. (Tr. 54) The Government put on no evidence of medical testimony because the victim had cleaned herself up before the medical examination. (Tr. 184)

At Sex Squad headquarters at 300 Indiana Avenue,

N. W., Mrs. Harrison identified the appellant's photograph from a group of photographs as the man who had raped her. (Tr. 58)

On March 6, 1969, Mrs. Harrison and one of the police witnesses identified appellant at a lineup. (Tr. 58, 136)

Case For The Defense

The appellant was employed at the Hopfenmaier Company in the District of Columbia (Tr. 239) on the night that Mrs. Harrison was raped. Appellant worked until 11:55 P.M. (Tr. 245) at which time he received a ride home with two other employees, arriving at his home at 1418 Corcoran Street, N. W. at 12:50 A.M. After taking a bath, he went directly to sleep. (Tr. 247)

Appellant does not know how to drive a car, (Tr. 252) and had no driver's license. (Tr. 237) He does not own a long black coat or a black hat and has never worn hats, (Tr. 250) the garb worn by the assailant.

Appellant has a brother who looks like him. (Tr. 209, 210)

Appellant does not know the victim or her consort (Tr. 250) and does not know where the Hickory Hut is. (Tr. 249)

He was admitted to St. Elizabeths Hospital on July 15, 1969 for mental observation and examination, and was found not to be a sexual psychopath. (Tr. 18)

The Trial Proceedings

Marshals were unable to locate or subpoena the appellant's brother, Lafayette Austin. (Tr. 65) A photograph of Lafayette, which was cut down to conceal the fact that it was a mug shot, was entered into evidence. (Tr. 75) At the conclusion of the Government's case and at the conclusion of all testimony, the defense moved to dismiss the charge of kidnapping on the ground that the prosecution had not shown transportation for the purpose of ransom, reward or otherwise, the Court denying the motions. (Tr. 152, 156, 187, 280) The defense moved to dismiss the charge of rape for lack of corroboration of the corpus delecti by the prosecution. The motion was denied by the Court. (Tr. 154, 156, 187, 280) The defense moved for a mistrial because witness James Austin had testified before the jury that he had visited the appellant at St. Elizabeths Hospital. The Court overruled the motion. (Tr. 222, 223)

The Government sought to introduce into evidence at rebuttal a picture of defendant showing him wearing a hat at the time of his arrest. The Government conceded it now recognized the picture might have been

helpful to the defense. The defense asked for a mistrial, which was denied (Tr. 263-269)

In rebuttal, Mrs. Harrison was shown the picture of Lafayette Austin and over objection that it was improper rebuttal was permitted to testify that she recognized the man as Lafayette Austin because he came into her building to see other people but that this was not the man who raped her. (Tr. 274, 275)

I THERE WAS INSUFFICEINT CORROBORATION TO SUBMIT THE CHARGE OF RAPE TO THE JURY.

(Please read Tr. pages 33-39, 42, 48, 49, 53-54, 83, 87, 184)

In Allison v. United States, 409 E2d 445 (1969), the Court, in elucidating the requirement of corroboration in sex cases, reiterated the principle that such corroboration in each case "must be evaluated on its merits". Bailey & Humphries v. United States, 132 U.S. App. D.C. 82, 405 F.2d 1352 (1968). The Allison Court also stated, "It is the law of this jurisdiction that no person may be convicted of a sex offense on the uncorroborated testimony of the alleged victim."

With the above principle in mind, appellant wishes to emphasize that there was absolutely no medical, eye witness, or demonstrative corroborative evidence.

The victim was assaulted before no witnesses. There was no evidence of semen, tearing or bruises presented. As far as we know, her clothing was not harmed, and if it was besmirched, as the prosecutrix testified, the clothing was not shown to the jury. (Perhaps in explanation, the complainant testified that at the hospital, there was a delay before the examination, and since she

felt dirty, she washed herself out. No reason was given for not putting her clothing into evidence. The clothing, were it grimy as she said, might, because of the likelihood of greases, have shown whether appellant, who worked at an animal fat rendering plant, was in fact the assailant.

The lack of evidence of tearing or bruising was surmised by the judge to be due to the fact that complainant was a mature woman with nine children. The judge cannot be considered an expert nor was she entitled to take judicial notice of the above.

The corroboration relied upon included opportunity of the accused, his conduct in running when pointed out by the complainant, the emotional condition of the prosecutrix and the promptness of her complaint at the first likely opportunity.

Under the curcumstances of this case, such corroboration as was presented cannot be held to be sufficient to support the verdict.

Appellant did not deny that someone took the complainant up the alley. In addition to the complainant's testimony, her escort from the party attested to that.

But her testimony that she was raped and her identification of the rapist were substantially uncorroborated.

The opportunity of the accused at most must rest upon complainant's unsupported testimony plus an eyewitness testimony that he was with complainant some minutes earlier than the offense and some interval later. This is not in itself sufficient corroboration to remove a reasonable doubt. To this must be added his conduct in fleeing when pointed out, corroboration perhaps of many acts other than sexual assault. The emotional state of the prosecutrix and her outcry, after her conversation with the waitress, do little to corroborate, and any motive to fabricate is not eliminated. If she remained in that alley and in the automobile as long as she said, she surely would prefer to have it know that it was at the point of a knife and a gun, by a madman rapist, rather than by the man to whom she may have submitted voluntarily or semi-voluntarily.

In Allison, there was at least the corroboration of opportunity and physical contact. In the instant case, we have an outcry sometime afterwards, witnesses before and after the alleged rape, but no corroboration

as to any of the essential elements of a sexual offense.

The less astringent corroborative requirement for identification was not met. (Allison, supra)

The above is not truly independent evidence. Nor is it sufficient evidence of such probative value that it could convince a trier of the fact that the crime was committed. (See Terry, supra)

In United States v. Bryant, 420 F.2d (1969) this Court reaffirmed the necessity of corroboration in sex assaults, and pointed out a case of "marginal" corroborative evidence. The Bryant corroboration consisted of the prosecutrix's prompt complaint to police, bruises and shaking, and her dress with a torn shoulder strap. The Court took note of these various factors, but the turning point corroboration was the torn shoulder strap. The Court saying:

> "We conclude that the dress with the torn shoulder strap offers enough independent corroboration of complainant's account to avoid the requirement that a verdict be directed for the accused."

The Bryant corroboration had as its crucial factor (and as the factor absent in our case) physical

evidence. All we have in this case is the prosecutrix testimony and her demeanor in the restaurant. The two elements of demonstrative evidence that might have corroborated her claims were absent. The laboratory test she effectually prevented by her own act. Why her soiled clothing was not introduced, the record does not show.

For a discussion of this Court's teaching in corroboration in sex cases, see The Georgetown Law Journal, Volume 53, No. 3, Feb. 1971, pages 665-669.

II THE TRANSPORTATION ELEMENT ESSENTIAL TO A KIDNAPPING CONVICTION WAS NOT PROVEN.

(Please read Tr. pages 36-39, 42, 44, 46-49, 83.)

The events with which we are concerned involved a time span of something more than an hour during which the complainant, fearful of her life and threatened with a weapon, was walked through an alley and back onto the street while the assailant sought a place to have intercourse with her. The act was consumated in an automobile. During part of this time, police cars circled looking for him and the victim. When police had departed and the act of intercourse was completed, he offered to take her to an apparently nearby apartment for drinks, but instead she suggested coffee or food, and at her suggestion he drove her to a restaurant perhaps three quarters of a mile away from the initial encounter. During this time the complainant felt threatened and at one point at the conclusion of the ride as he took her into the restaurant there was, she felt, a hard object at her back.

Do these facts comprise kidnapping beyond a reasonable doubt and is the jury entitled to so find?

We submit the answer is No.

As applied to this case, a kidnapper is one who abducts and detains another for a variety of purposes. (22 D.C. Code 2101) It is distinguished from other crimes, because the abduction is crucial. If the Government be entitled to charge and the jury allowed to convict under the facts here, there must be present facts other than rape; otherwise virtually every rape could be a kidnapping. Is, as trial counsel inquired, the movement of a person from living room to bedroom in a house kidnapping? The Government's reply at trial was it might depend on whose house.

Did Congress intend that under those or these circumstances there be an additional crime to rape? Did Congress intend that forcing a woman to walk up an alley and out to a car was kidnapping?

This is, we contend, an instance of the Government piling on charges and thus virtually assuring a conviction (or convictions) that might provide sufficient opportunity for incarceration or other punishment to satisfy the Government.

Rape, with its possible extreme penalty, or-

dinarily would surely have been sufficient, but here the rape case was weakened by the absence of any medical, eye-witness or demonstrative corroboration evidence. The Government found in the facts of this case what it holds is the abduction necessary to establish kidnapping with its life sentence.

The cases of United States v. Wolford, USCA (DC) No. 24,110 and United States v. Flurry, USCA (DC) No. 24,200, consolidated on appeal and decided by this court on March 25, 1971, elucidate the kidnapping statute in the District of Columbia, used in corroboration with other crimes. In Wolford and Flurry, this Court upheld the abduction for robbery and kidnapping, where the abduction included a truck ride of more than three miles through Rock Creek Park, etc., for the purposes of a liquor truck hijacking. This was a typical gangster-style crime. In reaching the conclusion that both the kidnapping and the robbery conviction would stand, the Court declined to find merger or duplication and set forth the following principles.

1. The mental element of one crime must be separate and distinct from the mental element associated

with the other crime. (Citing Chatwin v. United States, 326 U.S. 455 and Prince v. United States, 353 U.S. 322 (1957).

In Prince, the Supreme Court held that the crime of entry with intent to rob a bank merged with the completed robbery. The language of Prince, with the facts of the instant case substituted, demonstrate why appellant says there was merger here.

The gravamen of the offense is not in the act of walking the victim at gunpoint up an alley and on the street looking for a spot or an automobile in which to rape her. These facts would satisfy the terms of the statute just as much as or as little if the act was simply walking her down the street at high noon, if the assailant had put the victim in fear. Rather, the heart of the crime was the intent to rape. This mental element merges into the completed crime if the rape is consumated.

2. The abduction must substantially increase the risks of harm over and above that necessarily present in the crime irself (Citing People v. Daniels, 459 P.Ed 238, 30 Cal. Rptr. 904).

The "abduction" of the woman in this case was

fraught with danger to her, but it was the same order of jeopardy to which she was exposed during the assault upon her, accepting her account as she gave it.

In Wolford and Flurry, this Court noted the extended transportation and the considerable time that elapsed there, utilizing those factors among others to demonstrate the separability of the kidnapping charge.

3. The Court will find merger in order, in part, to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal. (Citing People v. Lombardi, 20 N.Y. 2d 266, 229 N.E. 2d 206, 282 N.Y.S. 2d 519 (1967), People v. Levy, 15 N.Y. 2d 159, 204 N.E. 2d 842, 256 N.Y.S. 2d 793, cert. denied 381 U.S. 938 (1965), and People v. Miles, 23 N.Y. 2d 527, 539, 245 N.E. 2d 688, 694, 297 N.Y. 913, 921, cert. denied 395 U.S. 948 (1969).

In Miles, the N.Y. Court of Appeals cut back the effect of the earlier cases, in pointing out "the more complicated nature of the asportations" (including a roundabout almost trip between New York and New Jersey) which ride was for purposes "connected with but not directly instrumental" to a crime other than

kidnapping.

It is submitted that the instant case with its limited asportation by foot for the sole purpose of, if the Government version be believed, of an assault, has the earmarks of Levy-Lombardi, rather than Miles.

This Court said in Wolford-Flurry, "although the above quote (for Miles) leaves the test to be applied in subsequent cases less than precisely defined, nevertheless, the circumstances of the present case are analogous to the fact involved in Miles."

There is surely no indication that Congress intended that the act of the accused here could support multiple convictions.

After the assault, the victim was driven to a gasoline station and then to a restaurant. Although the record does not present a clear picture of that distance involved, it would seem from the city maps perhaps three quarters of a mile in total.

Should it be contended by appellee that this transportation is part of the abduction charged, it should be pointed out.

1) that this portion of the transportation

was entirely at the suggestion of the victim, who thought that at the gasoline station, she might get help or escape, and this was also her hope, which was realized, in asking to be driven to the restaurant. Candor compels us to point out here that she was warned not to "try anything", etc.

2) the indictment clearly charges that the transportation was for the purpose of an "assault", and it was for this that appellant was convicted. The transportation after the completion of the assault, the alleged rape here, is not to be lumped with or considered a part of the forced walk through the alley and the search for an automobile. This was a new episode and appellee was not indicted for it. He cannot be convicted, of course, of that offense for which he was not indicted.

III APPELLANT WAS DENIED A FAIR TRIAL BY THE PREJUDICIAL ADMISSION OF TESTIMONY ELICITED BY THE GOVERNMENT THAT (1) PICTURES OF APPELLANT WERE IN THE SEX SQUAD AND (2) APPELLANT WAS IN ST. ELIZABETHS HOSPITAL.

(Please read Tr. pages 216-223.)

Non-relevant testimony elicited by the Government over objection of appellant may very well have persuaded the jury that, whether guilty of this offense or not, appellant was a known sex maniac who should be kept incarcerated. The testimony was deliberately and intentionally presented by the Government and in one instance was, in effect, ordered by the trial Court for the purpose of obtaining a ruling from this Court. Appellant too invites such a ruling.

The pertinent testimony is in two sections. The testimony concerning the photographic identification in the Sex Squad follows immediately:

> MR. NESBITT: Your Honor, at the preliminary hearing of this case I conducted a preliminary hearing and at the conclusion of it I asked the officer about the pictures and the officer's testimony was he apprehended him as a result of her identification of the picture. Is that correct? He said Yes. And there were a few other questions.
>
> But the main question I wanted to get out, Your Honor, was that I asked the officer at that time were these pictures that were shown to her,

were they pictures normally kept in the custody of the Metropolitan Police Department Sex Squad, and the answer was that is correct.

Is this man known to the Sex Squad? Yes, he is.

That is the testimony of the police officer and the reason I put it in the record is that the next question ordinarily would show that this man has a mug shot on file.

MR. SHARP: I am going to ask when showing the photographs -- I have indicated that if his answer is yes, to say so and not to amplify it.

I understand these are Polaroid pictures. I am refraining from that too.

MR. NESBITT: There is a very apt recent book of photographs and it has only persons known to the Sex Squad to be sex deviate violators.

This is not a new jury and the answer to the next question, no matter what it is, is going to indicate that this man is in the file somewhere.

MR. SHARP. I hope that this jury hasn't heard in any previous case that the Sex Squad keeps pictures on file of deviates or sex offenders,

I am not sure this is the case. I am sure that has not reached their ears.

MR. NESBITT: You asked the question, were you shown pictures.

The next question: As a result of this picture this man was apprehended.

Then somebody is going to have to testify later that he was apprehended as a result of the pictures.

MR. SHARP: I am going through the lineup.

MR. NESBITT: I thought you were going to but--

MR. SHARP: Your Honor, it has always been my practice where identification may become an issue to go through the photographic identification and

the lineup identification.

I have been careful with each witness to caution the witness to only answer in terms of yes or no. Some say they picked them out at the police station and again at the lineup.

I want to get the whole picture before the jury. I think it must help.

THE COURT: I expect you have to find out how many pictures she was shown.

MR. NESBITT: I have to go through the whole thing in effective representation of counsel.

If I do not go through it, it is a fact that there is a mug shot on file.

So I am hoping you are going to make the identification from the lineup.

MR. SHARP: I also intend to do that.

MR. NESBITT: I am going to object to any further questions that would indicate to this jury that the man has a mug shot, is known to the Police Department.

MR. SHARP: Your Honor, I cautioned the witness not to mention the mug shot nor will I mention it.

THE COURT: Is this a new tactic, Mr. Nesbitt? You haven't objected in the past to photographic identification.

MR. NESBITT: That is true, Your Honor. I have lost a lot of cases. I have found juries are not as unsophisticated as we think.

Show them a lot of pictures and as a result of seeing pictures this is what happens: Oh, he has a record; known to the Police Department.

And unless they come back and show that it was a driver's license or something the burden has shifted very directly to me and we both know the man has a prior record for sex offenses and the Government has not sought to use any question

of his past for the purpose of making related offenses.

At this point it makes an insumountable burden on me.

MR. SHARP: I don't think it is.
I can't tell you what your tactics will be.

THE COURT: I think this is probably as good a time as any for a clear-cut ruling by the Court of Appeals, and the Court will ask you to ask the question, and go ahead and get it.

MR. NESBITT: All right.

(Whereupon counsel resumed their places at the table and the following proceedings were held:)

MR. SHARP:

Q. I believe my last question was did there come a time when you were shown photographs?

A. Yes, there was.

Q. Where was this?

A. At 300 Indiana Avenue, Sex Squad.

Q. Now were you able to identify any of the photographs?

A. Yes, I was.

Q. Who was that?

It is noteworthy that while the Government initially indicated its sole interest was in determining whether the witness recognized appellant's picture and would go no further, after the trial court's suggestion, the Government asked its witness where the

picture was viewed, and the answer included "Sex Squad".

Moreover, the objectionable answer was responsive to the question.

This Court held in Barnes v. United States, 124 U.S. App. D.C. 318 509, (1966) that it was prejudicial error for the Government to introduce into evidence a badly disguised mug shot of the defendant as indicating that the person on trial had a criminal record. In addition to the long established rule that evidence of prior crimes is not automatically admissable, the Court also emphasized the decision of Vaughn v. State, 215 Ind. 142, 19 N.E. 2d 239 (1939), which noted that where the victim identified the defendant in court, the photographs have "little or no probative value in themselves.

While here, appellant's photograph was not shown to the jury, the effect of the testimony that his picture was exhibited in the Sex Squad was even more devastating than the fact that his picture might be on file with the Police Department. The Sex Squad obviously would have charge of the investigation of serious sex deviate crimes. This probability is to be noticed by the Court.

The error was serious, and not a mere lapse. Nor was it corrected. It clearly was not harmless beyond a reasonable doubt, and on that basis a new trial should be afforded free of this tainted evidence. (See Gillison v. United States, 399 F.2d 586 (1960), and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 705 (1967).

In Shuman v. United States, (D.C. App.) 243 Atl.2d 900, the Court declined to reverse where there was a prejudicial reference to a photograph, but the Court carefully noted that the trial Court moved in a timely fashion to strike the offending testimony. See also Saunders v. United States, (D.C. App.) 224 A.2d 473 (1966).

Cross-examination testimony that the defendant had been in a mental hospital added to the prejudice of earlier testimony so as to deprive appellant of a fair trial.

(Please read Tr. pages 216-223.)

This testimony came from appellant's brother James Austin, who on direct examination testified that appellant and another brother closely resembled each

other. On cross-examination, the Government elicited what information it could as to the contacts the brothers had over recent years. Questions as to the number of contacts each year were presented and were answered rather vaguely and sometimes discursively.

The damaging testimony came as a result of questions as to the number of contacts in 1969. James Austin replied that he visited Whitt Austin at St. Elizabeths Hospital two or three times during that year.

Defense counsel asked for a mistrial, saying that an instruction that the defendant had been examined at St. Elizabeths and found to be mentally competent would only exacerbate the situation.

Insanity was not a defense in the case.

Appellant relies on the authorities cited in the prior point.

In essence, appellant was wrongfully presented to the jury as a deranged fiend, a man known to police as a sex mad rapist. No other conclusion is likely.

Perhaps standing alone, the evidence having come in on cross-examination and not in response to the exact questions asked, an instruction such as that

given in Saunders, supra, would have been curative. But where coupled with the almost certain inferences from earlier testimony that appellant's picture was to be found in the Sex Squad and that a person raped would be shown his picture there as a suspect, the thought of appellant loose on the street must have sent shudders through the jury.

A new trial is compelled by the cumulative effect of the derogatory testimony about appellant.

IV. BY WITHHOLDING FROM THE DEFENSE A PHOTOGRAPH OF THE DEFENDANT WHICH THE GOVERNMENT CONCEDED MIGHT HAVE AIDED THE DEFENSE, THE GOVERNMENT EFFECTIVELY DENIED DUE PROCESS OF LAW TO APPELLANT.

(Please read Tr. pages 263-269.)

The prosecutrix had testified that the assailant wore a hat. However, the defendant testified under cross-examination that he never wore a hat.

After the defendant concluded his testimony, the Government disclosed for the first time that the officer who took the picture taken at the time of defendant's arrest was not available, and hence there was no testimony as to whether the hat was in fact appellant's. Moreover, the arrest picture evidently showed the defendant to be much heavier than an earlier picture.

Defense counsel moved for a mistrial under Brady v. Maryland, 373 U.S. 83 (1963), stating that the Government had in its possession evidence which might properly be used to assist in preparation of the defense.

The Government conceded that at this point it realized the picture might have aided the defense (Tr. 268 lines 8-9), but said that the photograph was not brought to defense counsel's attention earlier be-

cause it was a photograph taken at the time of arrest."

It is recognized that the Government must submit to defense counsel information, whether evidentiary or not, which may aid the defense, and is responsible for delivering any such information which it can reasonably be expected to obtain or which is in its possession. See Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967), and Barbee v. Warder, 331 F.2d 842 (4th Cir. 1964). The motion for a mistrial was made and denied. A mistrial at that late point of the case was the only remedy.

V. APPELLANT WAS ENTITLED TO A COURT ORDER COMPELLING POLICE TO BRING TO COURT ALL FILE PICTURES WHICH RESEMBLE APPELLANT.

(Please read Tr. pages. 159-165.)

The defense in this case was misidentification. The prosecutrix's initial identification of appellant was from a police photograph. Out-of-court identification must not be permitted to taint in-court identification, taking into account the totality of the circumstances. Clemons v. United States, Clark v. United States, Hines v. United States, 408 F.2d 1230 (1968).

It is true that the request for all police photographs resembling appellant was in general terms and might have been refined. But the purpose of the request was clear. It most certainly would have been suggestive for police to have shown the prosecutrix one picture. It would have been suggestive for police to have shown the prosecutrix a number of pictures only one of which was of a man whose features remotely resembled those described by the prosecutrix. While the information retrieval process which turned up appellant's photographs may not have been relevant, the fairness of the identification depended upon the set of pictures

shown was a fair sample. Just as a lineup must be exemplary, United States v. Wade, 388 U.S. 218, (1967), so must a photographic identification.

This Court has approved as in United States v. Stevenson, No. 23,922 USCA DC (Decided December 2, 1970), the use of photographic identification and there cited a proper procedure, wherein the "pictures were displayed to the Court and found to be a fair presentation of possible suspects in line with the complaining witness' description and similar in appearance to the appellant himself".

Moreover here, unlike the situation in Stevenson, supra, the lighting during the crime was poor, the witness was frightened, the assailant wore a hat low on his head and a coat.

If the photographic identification was tainted, it tainted the lineup identification; hence the in-court identification was impermissible. See also United States v. Hamilton, 420 F.2d 1292 (1969).

CONCLUSION

Prejudicial and non-relevant matter introduced into evidence denied appellant a fair trial. The Government's failure to disclose a crucial photograph to defense counsel violated appellant's right to due process of law. Appellant was entitled to view the photographs, if any, of persons meeting the description of the assailant and not shown to the prosecutrix by police. An essential element of kidnapping was not proven nor could it be proven. The rape allegation was not sufficiently corroborated.

For the above reasons, appellant respectfully submits that the judgment of the court below be reversed. In the alternative, he submits that he has shown that certain charges were not sustained and that therefore he should be resentenced on any counts which have validity.

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223-4580

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1090

UNITED STATES OF AMERICA, APPELLEE

v.

WEITT AUSTIN, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JAMES E. SHARP,
GUY H. CUNNINGHAM, III,
Assistant United States Attorneys.

Cr. No. 620-69

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

I. Was there sufficient corroboration of the *corpus delicti* of rape?

II. Did the evidence support a conviction for kidnapping as a separate and distinct offense from rape?

III. Was appellant unfairly prejudiced by testimony concerning a pre-trial photographic identification or by a reference, during cross-examination of a defense witness, to appellant's examination at Saint Elizabeths Hospital?

IV. Was the Government obliged, in the absence of any request, to provide the defense with a photograph of appellant taken at the time of his arrest?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a six-count indictment filed April 28, 1969, appellant was charged with kidnapping (22 D.C. Code § 2101), rape while armed (22 D.C. Code §§ 2801 and 3202), rape (22 D.C. Code § 2801), robbery (22 D.C. Code § 2901), and two counts of assault with a dangerous weapon (22 D.C. Code § 502), all arising out of a series of events which occurred on January 25, 1969. After a trial before a jury and Judge June L. Green on July 13-15, 1970, appellant was found guilty of kidnapping, rape while armed, robbery, and both counts of assault with a dangerous

weapon.[1] On January 18, 1971, appellant was sentenced to six to eighteen years for kidnapping and rape while armed, and three to ten years on each of the other counts, all sentences to run concurrently. This appeal followed.

The Government's Case

Testimony of the Prosecutrix

Mrs. Queen Harrison and her male escort, Ben Pettiford, Jr., left a party in Southeast Washington early in the morning of January 25, 1969, in the company of Bruce Johnson and Helen Swanson, who were going to drive Mr. Pettiford home. Because Mr. Johnson "wasn't driving too good,"[2] Mrs. Harrison and Mr. Pettiford got out of the car at Fifteenth and East Capitol Streets, where they tried to catch a cab (Tr. 32-34). Appellant, wearing a long black overcoat and a hat, came up to them with his hands in his pockets and engaged in a brief conversation about whether they were in a good location to catch a cab. They crossed the street twice in an effort to get away from appellant, who caught up with them, said, "This is far enough," and forced them into a small alley. Mrs. Harrison pleaded, "Mister, don't hurt us. Do you want my money?" Appellant replied, "Yes, give me your money, but I want you too" (Tr. 36). At this time Mr. Pettiford tried to grab appellant, who pulled a gun from his pocket and struck Mr. Pettiford in the mouth with it, knocking him to the pavement (Tr. 36). Appellant ordered Mrs. Harrison to "tell your friend to go home or I am going to kill him," which she did after giving appellant $8.00, all the money she had (Tr. 38). Mr. Pettiford accordingly left.

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[1] The simple rape count was dismissed at the prosecutor's request before the case was submitted to the jury. The court also charged on the lesser included offense of assault with intent to commit rape while armed (Tr. 279, 319-321).

[2] Everyone at the party had been drinking. Mrs. Harrison had drunk two highballs (Tr. 33), and Mr. Pettiford had had two Scotches and four beers, in addition to one beer at 4:45 the previous afternoon when he finished work (Tr. 99).

Appellant pushed Mrs. Harrison back near some parked cars and told her, "Pull your pants off." She fell to the ground and acted as if she were complying when a dog started barking. Appellant said, "We can't do nothing here." Taking Mrs. Harrison with him, he tried the locked doors of several parked cars and then opened the door to one, saying that he had the key to a friend's car, and pushed her in the back seat (Tr. 41).[3] Appellant removed his hat and coat and told Mrs. Harrison to remove her panties. She refused, and he put his gun away, pulled out a switchblade knife, and said that he would cut them off if she did not take them off. She then complied by partially removing her panties and panty girdle so that only one leg was still in them (Tr. 42). Appellant then unzipped his fly and got on top of her, effecting penetration twice (Tr. 43). While appellant was having intercourse with Mrs. Harrison, she saw the revolving red lights of passing police cars on two occasions. Appellant blamed her friend (Mr. Pettiford) for calling the police and used his knife to make her lie down out of sight (Tr. 43).

At least an hour passed, and when she complained of the cold, appellant offered to get her a drink of liquor, which she refused, saying that she wanted coffee. He protested that he has no gas, but she reminded him that he had her money and could buy some. He then said he was going to take her to an empty apartment building, and she repeated her request for coffee or something to eat. At his command, she jumped over the seat into the front with appellant, who told her, "Don't try nothing. Don't make me mad. I won't hurt you." (Tr. 44-45.) They drove to a gas station where she thought she could make a break, but there was only one person working there, and appellant again told her not to try anything. Appellant got a dollar's worth of gas, and Mrs. Harrison, realizing that they were in the neighborhood of the Hick-

[3] Mrs. Harrison described this car as "an old, raggedy car, dark color car, and it had a real loud muffler, smoked a lot" (Tr. 43).

ory Hut, suggested that they go there for coffee (Tr. 46).[4] They parked at the Hickory Hut; appellant looked in the door and then went to the side of the building to urinate. He then said she could accompany him inside, and he followed her in, poking something hard in her back. Shortly thereafter appellant went outside to move his car, and Mrs. Harrison told a waitress, Sarah Ann Morant, that she had been raped (Tr. 48-49). Miss Morant said that she would get the police. Appellant returned, and someone advised Mrs. Harrison that there were now two policemen in the corner. She replied, "Who called the police? I didn't call the police," because she did not want appellant to know that she had. However, "all the time I was trying to get away from him enough to run to the police. That is when I stepped a few steps from him and that's when I broke out and grabbed the police and I started hollering." She then passed out (Tr. 50).[5]

After being revived, she was taken to a police station, where she gave a statement, and then to D.C. General Hospital, where she was told to wait for a policewoman. She waited at least two hours,[6] and before she was examined, she went to the bathroom and "washed [herself] out" (Tr. 53-54).

Mrs. Harrison identified appellant as her assailant during the course of the trial (Tr. 35) and testified to her selection of appellant's photograph from a book of pictures at the Sex Squad office (Tr. 58, 96) and her identification of appellant at a lineup held on March 6, 1969 (Tr. 58).

The Other Government Witnesses

Ben Pettiford's testimony paralleled that of Mrs. Harrison, including his recollection of appellant's statement, "I

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[4] She had previously suggested that they go to D.C. General Hospital, but appellant had refused because there were too many police there, and "he said that my friend [Mr. Pettiford] had probably called the cops and he couldn't go there" (Tr. 88).

[5] It was then 5:00 a.m. (Tr. 76).

[6] Apparently the policewoman was there all this time, but neither woman knew who the other was (Tr. 53).

want your money and you too." Two of Mr. Pettiford's teeth were broken when appellant struck him in the mouth with the gun (Tr. 103).[7] Mrs. Harrison then told him, "Don't fight him because if you do he will kill both of us." Mr. Pettiford left and called the police to report that he had been knocked to the ground and that his girl had been kidnapped. When the police arrived, he rode around the block with them a few times with the revolving light on top of the police car turned on, but they were unable to locate Mrs. Harrison or her abductor. These two policemen left, but others came when Mr. Pettiford called again; a second search of the area was also unsuccessful (Tr. 103-105).

Sarah Ann Morant, a waitress at the Hickory Hut, made an in-court identification of appellant, stating that she had seen him in the restaurant standing behind Mrs. Harrison at about 5:00 a.m. on January 25, 1969. When he went outside, Mrs. Harrison told her that she had been raped and robbed. Miss Morant went to the kitchen and got the police. She testified that she had seen appellant on fifteen or twenty other occasions during her midnight to 8:30 shift.[8] On these previous visits he had driven an "old, beat up, dark colored car" with a loud muffler (Tr. 110-114). Miss Morant described Mrs. Harrison as nervous and "hysterical like" (Tr. 111-113).

Metropolitan Police Officers John Carroll and Ralph Brickley testified that they were having coffee in the kitchen of the Hickory Hut when they were called to the front of the restaurant by a waitress. They heard Mrs. Harrison first deny calling the police, then hysterically report, "He raped me, he raped me, somebody, please, he raped me, he has got a gun, he has got a gun" before passing out (Tr. 123-124, 129-130). Officer Brickley identified appellant as the man he had seen standing in the

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[7] He went to the hospital but was not treated that night. The teeth later had to be removed (Tr. 106).

[8] Miss Morant testified, "Well, sometimes he ordered and sometimes he didn't, he just came in and, you know, stare at me or some of the other girls that might have been working" (Tr. 110).

restaurant at the time Mrs. Harrison grabbed Officer Carroll and who left immediately thereafter. Officer Brickley followed him out and saw him leaving in a dark-colored "ragged, old car" (Tr. 131-134).[9] He also testified to his photographic identification of appellant a "couple of days after" the incident and his later lineup identification (Tr. 134-135, 150).

The Case for the Defense

Appellant relied at trial on a claim of mistaken identity and sought to support that claim by showing that his brother, Lafayette Austin, looked very much like him.[10] All efforts to locate Lafayette Austin and to secure his presence at trial, however, met with failure. Two defense exhibits, a police department photograph of Lafayette Austin taken on February 22, 1967, and the Sex Squad photograph of appellant identified prior to trial by Mrs. Harrison and Officer Brickley, were shown to Mrs. Harrison and the officer during cross-examination. Each recognized the photograph of appellant as the one that he had previously identified, and each stated that he had not previously seen the photograph of Lafayette Austin (Tr. 91, 150).[11]

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[9] Officer Brickley attempted to remember the license number of the auto driven by appellant so that he could write it down, but apparently he got the wrong number (Tr. 133-134).

[10] Appellant's counsel concisely stated his theory at the bench:

> My tactic is to present these [witnesses] to establish that both brothers look alike. After I have established that I will then attempt to establish [appellant's] whereabouts from early in the evening until late (Tr. 204).

[11] The two witnesses were asked whether they had previously been shown the photograph of Lafayette Austin, but not whether they could identify it. The court commented:

> Counsel hasn't even asked one of these identifying witnesses whether or not they can identify that photograph of Lafayette, because counsel appears to be afraid. What would the answer be? (Tr. 161.)

Called in rebuttal, Mrs. Harrison was again shown the photograph of Lafayette Austin. Over objection, she was permitted to testify

James Austin acknowledged appellant as his brother and identified the photographs of both his brothers. He said that Lafayette, the oldest of the brothers, was in his forties and knew how to drive.[12] He described the physical appearance of each of his brothers after the court ruled that the leading question of whether they looked alike could not be asked (Tr. 202, 209-210). On cross-examination, when asked how many times he had seen his brother Whitt in 1969, he replied that there had been two or three times when he went to visit appellant at Saint Elizabeths Hospital (Tr. 219). Appellant's motion for a mistrial was denied, and a cautionary instruction was given that no inference should be drawn from the fact that he had been examined to determine his competency to stand trial (Tr. 223-224). Mrs. Lula Hawkins, appellant's sister, testified that to the best of her knowledge appellant did not drive. She did not know where he lived, nor did she know how he had gotten to her home on the one occasion when he visited her in 1968 (Tr. 227-229).

The foreman on appellant's job, Willie Bruce Perry, testified that appellant normally worked from 3:30 p.m. until about midnight at the Hopfenmaier Company in the 3300 block of K Street, N.W., and had punched out at 11:55 p.m. on January 24, 1969. Mr. Perry normally drove appellant home, and he had never seen appellant drive an automobile (Tr. 230-233). Robert H. Legeer testified that he had searched the records of the Department of Motor Vehicles and had found no record for the name Whitt Austin.

Appellant testified in his own behalf. He identified the photograph of his brother Lafayette, whom he had last seen in 1967 at the District Jail.[13] He denied knowing

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that, though she had not seen the picture prior to trial, she had known Lafayette Austin since May 1970 as a visitor to her apartment building, that she had conversed with him, and that he was not her assailant (Tr. 271-275).

[12] Appellant testified that his own age was fifty and one-half years (Tr. 251).

[13] When the Government objected, this response was discussed out of the presence of the jury. The court noted, "I don't think he

restaurant at the time Mrs. Harrison grabbed Officer Carroll and who left immediately thereafter. Officer Brickley followed him out and saw him leaving in a dark-colored "ragged, old car" (Tr. 131-134).[9] He also testified to his photographic identification of appellant a "couple of days after" the incident and his later lineup identification (Tr. 134-135, 150).

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that, though she had not seen the picture prior to trial, she had known Lafayette Austin since May 1970 as a visitor to her apartment building, that she had conversed with him, and that he was not her assailant (Tr. 271-275).

[12] Appellant testified that his own age was fifty and one-half years (Tr. 251).

[13] When the Government objected, this response was discussed out of the presence of the jury. The court noted, "I don't think he

how to drive an automobile (Tr. 244), denied knowing where the Hickory Hut restaurant was located or ever having been there (Tr. 249), and denied owning a long black coat or a black hat (Tr. 250).[14] He also denied knowing either complainant or participating in any way in the offenses with which he was charged (Tr. 248-251).

Appellant was able to recall in detail the events of January 24 and 25, 1969, because of his "photostatic memory" (Tr. 258). He loaded some meat in a gentleman's car (not Mr. Perry's), punched out at 11:55 p.m. and left about 12:15 a.m. in the private car of someone whose name he did not know. This person dropped him off in front of his residence, 1418 Corcoran Street, N.W., at about 12:50.[15] He followed his usual custom of taking a bath, fixing dinner and going to bed. He awakened at about 7:30 a.m., had some coffee and went back to bed until about 9:30. He did not leave the house until around 2:30 p.m. the next day, when he started for work (Tr. 247-248).

On cross-examination appellant explained that his nightly bath was necessary because of the grease that he worked

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should have said it in the first place and I don't believe it was an innocent statement" (Tr. 241). Appellant was instructed not to make any further references to any criminal record of Lafayette, or the court would "permit the same question to be asked of you" (Tr. 244). The jury then returned to the courtroom.

[14] His testimony was "No sir. I do not wear a hat at any time" (Tr. 250). After cross-examining appellant, the prosecutor approached the bench and advised the court and defense counsel that he had a photograph of appellant wearing a hat which he had not previously "brought . . . to Mr. Nesbitt's [defense counsel's] attention because it was a photograph taken at the time of arrest" (Tr. 263). The photograph was not used to impeach appellant's testimony because no witness was located who could testify to the circumstances surrounding the taking of the photograph or its authenticity. Appellant's motion for a mistrial because of the government's failure to make the photograph available to defense counsel earlier was denied (Tr. 269).

[15] On cross-examination he said that he had gotten home at about 11:45 p.m. When asked how this was possible if he left work at 11:55, he explained that he had a little trouble telling time (Tr. 257).

in. He put it succinctly: "Sir, you stinks" (Tr. 261).[16] He also acknowledged on cross-examination that he had once started and moved a truck on his construction job, though he did not know how to drive or know what a brake or a gearshift was (Tr. 251-253).

ARGUMENT

I. There was sufficient corroboration of the *corpus delicti* of rape.

(Tr. 36, 43, 48-50, 54, 85-86, 89, 101, 104, 107, 109-110, 112, 124, 128-133, 141)

Appellant contends that there was insufficient corroboration of the *corpus delicti* of the crime of rape.[17] We disagree. The prosecution's obligation to present corroborative evidence in sex cases may be satisfied by a showing of "circumstances in proof which tend to support the prosecutrix' story." *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 17, 135 F.2d 633, 636 (1942), *cert. denied*, 318 U.S. 776 (1943); *accord*, *(William) Carter* v. *United States*, 138 U.S. App. D.C. 349, 354, 427 F.2d 619, 624 (1970) ("proven circumstances which tend to support the complainant's story"); *United States* v. *Terry*, 137 U.S. App. D.C. 267, 270, 422 F.2d 704, 707 (1970) ("any evidence, outside of the complainant's testimony, which has probative value—any evidence which could convince the trier of fact that the crime was committed"); *United States* v. *Bryant*, 137 U.S. App. D.C. 124, 128, 420 F.2d 1327, 1331 (1969) ("evidence, real or testimonial, of

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[16] On rebuttal Mrs. Harrison recalled the "very strong body odor" of her assailant, a fact which she had not mentioned in her earlier testimony but which had been in her original statement (Tr. 276).

[17] Appellant makes no claim that corroboration of identity is insufficient, nor could he on the facts of the present case. In addition to Mrs. Harrison's unhesitating identification of appellant, based upon abundant opportunity to observe, there is the corroborative identification testimony of Officer Brickley (Tr. 128-131) and Miss Morant (Tr. 109-110).

circumstances that tend to support the complainant's account"); *Bailey* v. *United States*, 132 U.S. App. D.C. 82, 87, 405 F.2d 1352, 1357 (1968) ("independent proof that points to the probable guilt of the defendant, or, at least corroborates indirectly the testimony of the prosecutrix"). It is of course beyond dispute that "[t]here can be no absolute test or concrete guidelines set down as to what constitutes corroboration in a rape case. Each case must be evaluated on its own merits." *Bailey*, *supra*, 137 U.S. App. D.C. at 88, 405 F.2d at 1358. Similarly, "[t]he degree of corroboration required varies with the case, dependent in large part upon the 'danger of falsification' by a particular complainant." *United States* v. *Huff*, —— U.S. App. D.C. ——, ——, 442 F.2d 885, 888 (1971). Clear medical evidence of forcible penetration is not required in every case. *Washington* v. *United States*, 136 U.S. App. D.C. 54, 419 F.2d 636 (1969). This Court has recognized a considerable number and variety of circumstances which may be corroborative.[18] In the case at bar there are five circumstances which, we maintain, sufficiently corroborate Mrs. Harrison's testimony that she was raped by appellant.

The first of these is appellant's statement of intent, communicated to her in the presence of her escort, Mr. Pettiford. Thinking that appellant meant only to rob them, Mrs. Harrison asked if he wanted her money. He replied, "Yes, give me your money, but I want you too" (Tr. 36).[19] The second corroborative factor is appellant's flight from the Hickory Hut at the time of Mrs. Harrison's accusation (Tr. 131-133, 141). Third, Mrs. Harrison's actions and emotional condition while in the Hickory

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[18] *See United States* v. *Terry*, *supra*, 137 U.S. App. D.C. at 271, 422 F.2d at 708, commenting on *Allison* v. *United States*, 133 U.S. App. D.C. 159, 162 n.8, 409 F.2d 445, 448 n.8 (1968); *cf. Borum* v. *United States*, 133 U.S. App. D.C. 147, 409 F.2d 433 (1967), *cert. denied*, 395 U.S. 916 (1969).

[19] Mr. Pettiford recalled the statement in similar words: "I want your money and you too" (Tr. 101).

Hut strongly support her story.[20] She seized upon the first moment that appellant left her presence to plead for help (Tr. 48-49), then denied calling the police at the same time as she was moving away from appellant (who had returned) toward them, and then hysterically reported that she had been raped and robbed by appellant who had a gun (Tr. 50, 112, 124, 130). Her momentary denial that she had called the police was an additional manifestation of the fear and terror that appellant had instilled in her, as was the fact of her fainting immediately after her report to the police. Not only did each witness who saw Mrs. Harrison at the Hickory Hut describe her as "hysterical" at that time,[21] but Mr. Pettiford indicated that when he visited Mrs. Harrison the following evening, she was still upset, and he "couldn't get too much sense out of what she was trying to tell [him] what had happened to her" (Tr. 107). Fourth is the absence of any motive to fabricate a charge of rape.[22] Mrs. Harrison and appellant were not previously acquainted and the evidence of the assaults on Mr. Pettiford and her, the robbery of the $8.00, and her abduction at gunpoint belie any suggestion that she became the willing sexual partner of her abductor and then charged rape at her first opportunity to get away from him. Similarly, her willing submission to a medical examination

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[20] The prosecutrix' prompt complaint of rape and her emotional state at the time of that complaint are among the most generally recognized forms of corroboration. *See, e.g., United States* v. *Bryant, supra,* 137 U.S. App. D.C. at 128, 420 F.2d at 1331; *McGuinn* v. *United States,* 89 U.S. App. D.C. 197, 198, 191 F.2d 477, 478 (1951); *Ewing* v. *United States, supra.*

[21] The first impression of both police officers was that "something mentally was wrong with" Mrs. Harrison (Tr. 124, 130).

[22] Appellant relied at trial on his defense of mistaken identity and never argued that the rape did not actually occur, though he questioned then, as he does now, the legal sufficiency of the corroborative evidence. The danger of erroneous conviction, and thus the need for corroboration, is of course much less when there is no affirmative evidence casting doubt upon the credibility of the complainant's testimony. *United States* v. *Terry, supra,* 137 U.S. App. D.C. at 272 n.7, 422 F.2d at 709 n.7.

compels the rejection of any suggestion that no sexual activity ever took place.[23] The last specific item of corroboration to which we point is the opportunity of appellant to commit the rape. His abduction of Mrs. Harrison at Fifteenth and East Capitol Streets and his later appearance with her at the Hickory Hut are both established by eyewitnesses. Even her testimony that she was forced to lie down in the back of the automobile and could see the revolving lights of the searching police cars was independently corroborated by Mr. Pettiford, who testified that he accompanied the police on that search (Tr. 43, 85-86, 104).

The corroborative testimony need not by itself support the verdict, but it must be such that it tends to show that the complainant's testimony is truthful. *E.g.*, *Coltrane* v. *United States*, 135 U.S. App. D.C. 295, 418 F.2d 1131 (1969). The ultimate decision as to the weight of the corroborative evidence rests with the jury.[24] We submit, nevertheless, that the circumstances of proof in this case constitute corroboration beyond peradventure of the *corpus delicti* of the rape as Mrs. Harrison described it, and that the trial court correctly denied appellant's motion for judgment of acquittal.

II. The trial court properly denied appellant's motion for judgment of acquittal on the kidnapping count.

(Tr. 34-36, 39, 83-85, 153)

Appellant's challenge to his conviction for kidnapping is twofold. First, he contends that there was insufficient transportation of the victim to bring his conduct within

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[23] No testimony concerning the results of this examination was introduced because Mrs. Harrison, who "didn't know the procedures they go through" (Tr. 89), "washed [herself] out" prior to the examination (Tr. 54). This very act of cleansing, however, in itself is corroborative of the fact of rape.

[24] This is, we submit, a case where "[a] reasonable jury could find, notwithstanding the lack of direct medical evidence confirming a sexual attack, that an attack did occur . . . ." *Bailey* v. *United States*, *supra*, 132 U.S. App. D.C. at 87-88, 405 F.2d at 1357-58.

the purview of 22 D.C. Code § 2101. In any event, appellant argues, the abduction in this case merged with the crime of rape, and a separate conviction for kidnapping cannot be sustained. We disagree with both contentions.

Both issues raised by appellant were discussed at length by this Court recently in *United States* v. *Wolford*, —— U.S. App. D.C. ——, 444 F.2d 876 (1971), and do not require extended comment here. Noting that, for all practical purposes, 22 D.C. Code § 2101 proscribes the same conduct as the Federal Kidnapping Act, 18 U.S.C. § 1201 (except for the interstate nature of the federal crime), this Court pointed out that decisions construing the meaning and application of the federal statute were an appropriate aid in interpreting the similar language of 22 D.C. Code § 2101.[25]

The victim in *Wolford* was detained for a period of forty-five minutes to one hour and taken a distance of approximately four miles from the point of his abduction. This Court held that the purpose of the detention—the facilitation of a liquor truck hijacking—was within the ambit of 22 D.C. Code § 2101, and that the crimes of kid-

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[25] In addition to the cases cited by this Court in *Wolford*, *supra*, —— U.S. App. D.C. at ——, 444 F.2d at 880-881, *see Davidson* v. *United States*, 312 F.2d 163 (8th Cir. 1963) (abduction and transportation for "sexual molestation").

Reference to decisions of other federal courts was necessary in *Wolford* because of the paucity of authority in the District of Columbia. However, in the unpublished case of *McCollough* v. *United States*, D.C. Cir. No. 22,144, decided May 25, 1970, where the asportation of the victim from Maryland to the District of Columbia was directed solely to the success of a robbery, this Court affirmed convictions of robbery, assault with a dangerous weapon, housebreaking *and kidnapping* (18 U.S.C. § 1201).

The United States Court of Military Appeals has also had occasion to interpret 22 D.C. Code § 2101 (which was held to be the source of the elements of the crime of kidnapping, though the offense occurred in Danang, Vietnam). In *United States* v. *Charlton*, 18 U.S.C.M.A. 141, 39 C.M.R. 141 (1969), the court considered it significant that Congress omitted any qualification as to time or distance from section 2101 and refused to disturb a plea of guilty to kidnapping, robbery and other offenses, where the defendants had forced their victim outside a building and then to a point twenty to twenty-five feet away where they took his money.

napping and robbery had not merged. *Wolford, supra,* —— U.S. App. D.C. at ——, 444 F.2d at 881-882. As this Court pointed out,

> the expressed intention of Congress when section 2101 was last amended was to broaden the coverage of the section to make it "applicable to those kidnappings in which the motive is lust, a desire for companionship, revenge, or some other motive not involving ransom or reward." H.R. REP. No. 1129, 89th Cong., 1st Sess. 2 1965). *Certainly a kidnapping for the purpose of committing rape was intended to be subject to the additional penalty for violation of section 2101. Wolford, supra,* —— U.S. App. D.C. at ——, 444 F.2d at 883 (emphasis added).[26]

The abduction in this case occurred at Fifteenth and East Capitol Streets (Tr. 34-36). The automobile in which the rape occurred was parked near Eastern High School on Seventeenth Street, two or three blocks from Fifteenth and East Capitol (Tr. 83-85).[27] This forced walk of a few blocks, while less than the several miles involved in *Wolford*, is, we submit, an abduction of far greater proportions than that in the *de minimis* hypothetical suggested to the trial court of "Walk[ing] her from the living room to the bedroom" (Tr. 153).[28] *Cf. Wol-*

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[26] This finding of legislative intent provides a clear basis for distinguishing *Prince* v. *United States*, 352 U.S. 322 (1957), which held that the offense of entering a bank with the intent to commit robbery is merged with the completed robbery under 18 U.S.C. § 2113. In resolving the merger question presented in *Prince*, the Supreme Court noted that it was dealing with a "unique statute of limited purpose and inconclusive legislative history." 352 U.S. at 325.

[27] An intermediate location, first selected by appellant for the rape, was abandoned after a dog started barking (Tr. 39).

[28] This hypothetical precisely reflects the facts of *People* v. *Daniels*, 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897 (1969) (*in bank*), one of several cases from other jurisdictions relied upon by appellant. *Daniels* concerned four separate rape offenses coupled with robberies, each involving no greater asportation of the victim than the confines of the victim's home (or in one case the victim's

ford, supra, —— U.S. App. D.C. at ——, 444 F.2d at 883 ("forcible detention of Wilson both in time and place went far beyond the momentary detention necessarily associated with every robbery"). Not only was Mrs. Harrison forced a distance of several blocks before she was raped by appellant, but she was forced to remain with him for an extended period of time after this sexual assault was completed—an aggravating circumstance which distinguishes this case [20] and makes clear that the application of both the kidnapping and rape statutes to the facts of this case is entirely proper.

III. Appellant's other claims of error are without merit.

(Tr. 55, 57-58, 75, 150-151, 159-165, 209-210, 222, 224-225, 250, 255, 263, 266-267)

The other contentions advanced by appellant call for only the briefest comment.

A. References to prior photographic identification of appellant and to his prior examination at Saint Elizabeths Hospital did not deprive appellant of a fair trial.

The heart of appellant's objection to any testimony concerning the original photographic identification made by the prosecutrix was that it "would indicate to this jury that the man has a mug shot, is known to the Police Department" (Tr. 57). The trial court overruled this ob-

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car) would permit. *Daniels* and the several New York cases cited by appellant were all distinguished by this Court in *United States* v. *Wolford, supra,* —— U.S. App. D.C. at ——, 444 F.2d at 882.

[20] Appellant suggests in his brief that this additional transportation after the rape should not be considered because it represents a new episode for which he was not indicted (Br. at 22). He cites no authority for this suggestion that a kidnapping terminates with the accomplishment of the objective (here, the rape) rather than with the termination of the detention of the victim, nor are we aware of any. *Cf. United States* v. *Wolford, supra* (kidnapping "for the purpose of stealing property of another," where the transportation of the victim occurred after the truck on which he worked was stolen and driven away by one of the participants in the crime).

jection, noting that it was "probably as good a time as any for a clear-cut ruling by the Court of Appeals" (Tr. 58). Since the time of appellant's trial this Court has had three occasions to provide the clear-cut guidance sought by the trial judge. *United States* v. *(Rudolph) Clemons*, —— U.S. App. D.C. ——, 445 F.2d 711 (1971); *United States* v. *Hallman*, 142 U.S. App. D.C. 93, 439 F.2d 603 (1971); *United States* v. *Lucas*, —— U.S. App. D.C. ——, 442 F.2d 728 (1970). *See also (Malcus) Clemons* v. *United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969).[30] *(Rudolph) Clemons*, *Hallman*, and *Lucas*, in permitting reference to prior photographic identifications, all distinguished *Barnes* v. *United States*, 124 U.S. App. D.C. 318, 365 F.2d 509 (1966), which condemned only the introduction of "mug shots" into evidence.[31] In the instant case the prosecutor avoided any reference which would suggest that the photograph of appellant viewed by either identification witness might have been a "mug shot."[32]

Appellant also argues that he was unfairly prejudiced, to the point of being denied a fair trial, by the revelation during cross-examination of appellant's brother that appellant had been in Saint Elizabeths Hospital during part

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[30] In *(Malcus) Clemons*, this Court, in rejecting different challenges to the admissibility of testimony concerning pre-trial photographic identifications, remarked:

> We also think that juries in criminal cases, before being called upon to decide the awesome question of guilt or innocence, are entitled to know more of the circumstances which culminate in a courtroom identification—an event which, standing alone, often means little to a conscientious and intelligent juror, who routinely expects the witnesses to identify the defendant in court and who may not attach great weight to such an identification in the absence of corroboration. 133 U.S. App. D.C. at 40, 408 F.2d at 1243.

[31] Even in *Barnes* this Court found no prejudice from the introduction of a second photograph, a full-length snapshot. 124 U.S. App. D.C. at 321, 365 F.2d at 512.

[32] Tr. 58, 150-151. The photograph was in fact a Polaroid picture, not a mug shot, and was introduced as a defense exhibit (Tr. 55, 75).

of 1969.[33] Appellant's counsel moved for a mistrial as soon as the cross-examination was completed (Tr. 222). This was denied, but the trial court instructed the jury that appellant's commitment to Saint Elizabeths had been for the purpose of determining his competency to stand trial, a standard procedure in serious cases, and that the jury should draw no inferences from the testimony that the witness had visited appellant at the hospital (Tr. 224-225). This curative instruction emphasized that the hospitalization of appellant related to this case, not some prior episode. Any possibility of prejudice to appellant was minimized, and there was no abuse of discretion in refusing to declare a mistrial. *Cf. United States* v. *(Jessie) Carter*, —— U.S. App. D.C. ——, 445 F.2d 669 (1971); *Hardy* v. *United States*, 119 U.S. App. D.C. 364, 343 F.2d 233 (1964), *cert. denied*, 380 U.S. 984 (1965); *McIntosh* v. *United States*, 114 U.S. App. D.C. 1, 309 F.2d 222 (1962), *cert. denied*, 378 U.S. 944 (1963); *Parker* v. *United States*, 404 F.2d 1193 (9th Cir. 1968). In each of these cases, testimony which suggested prior *incarceration* for *other* offenses was deemed not so prejudicial as to call for reversal. No different result is called for here, where the reference was merely to *hospitalization*, in connection with *this* offense, and the curative instruction informed the jury that appellant had been found competent.

B. *There was no violation of the government's duty to disclose exculpatory evidence.*

Appellant contends that he was denied due process of law because the government had in its possession a photograph of him wearing a hat, taken at the time of his ar-

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[33] The witness, James Austin, had testified on direct examination concerning appellant's physical appearance in 1969 (the year of the offenses for which he was on trial) (Tr. 209-210). The cross-examination which led to the response that James Austin had visited appellant at Saint Elizabeths Hospital was clearly intended to test the witness' opportunity to observe and ability to recall the appearance of appellant at that time, and was thus entirely proper.

rest, and did not disclose the existence of that photograph until after appellant had testified that he did not own or wear a hat (Tr. 250, 255). Arguing that the photograph "certainly could have been of assistance in preparation of my case," appellant's trial counsel moved for a mistrial on the basis of *Brady* v. *Maryland*[34] (Tr. 267). We submit that this motion was properly denied.

At the bench, the prosecutor advised the court and appellant's counsel of the existence of this photograph and explained that he had not previously "brought this to Mr. Nesbitt's attention because it was a photograph taken at the time of arrest" (Tr. 263). The court examined the photograph and observed that the hat did not fit the description given by the prosecutrix of the hat worn by her assailant (Tr. 266). The photograph was not used to impeach appellant, and its existence was not made known to the jury.

The test formulated by this Court for determining whether disclosure is required under *Brady* is whether the evidence "might have led the jury to entertain a reasonable doubt about [defendant's] guilt." *Levin* v. *Clark*, 133 U.S. App. D.C. 6, 9, 408 F.2d 1209, 1212 (1967); *accord*, *Xydas* v. *United States*, —— U.S. App. D.C. ——, ——, 445 F.2d 660, 667, *cert. denied*, 92 S. Ct. 57 (1971).[35] Appellant has not shown, and we are unable to perceive, how this photograph, which the jury did not know about, could have raised a reasonable doubt about his guilt in the minds of the jurors.[36]

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[34] 373 U.S. 83 (1963).

[35] Like *Xydas*, the instant case is distinguishable from *Levin* because the threshold information which would have led to the discovery of the photograph was in the possession of the defense. Not only would appellant be aware of the fact that he was photographed at the time of his arrest, but experienced defense counsel in this jurisdiction can hardly be ignorant of the common police practice of photographing arrested persons. *See generally Xydas*, *supra*, —— U.S. App. D.C. at ——, 445 F.2d at 667-668.

[36] Conceivably appellant would not have testified had his counsel known of the photograph, or at least he would have avoided the

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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subject of hats. However, since he was not impeached on this point, he suffered no prejudice from not having the photograph.

Appellant's remaining contention that he was entitled to a court order compelling the police to produce all file pictures resembling him is frivolous. Though appellant's motion to subpoena the Chief of Police was granted on July 8, 1970, the record does not show that any such subpoena was issued, nor was any such request made or renewed at trial (Tr. 159-165). The cases cited by appellant deal with photographs which *were* used in pre-arrest identifications, not photographs which could have been used but were not. On this record, we submit, there is no occasion to decide whether the court should have ordered production of photographs resembling appellant when no request was made for them. *United States* v. *Lewis*, 140 U.S. App. D.C. 40, 46, 433 F.2d 1146, 1152 (1970); FED. R. CRIM. P. 51.

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